88-1985

No.:_____

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

MARGARET HUDSON,

Petitioner,

-against-

NATIONAL RAILROAD
PASSENGER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether in this FELA action based on the respondent's negligence in allowing petitioner to be subjected to repeated sexual harassment by a higher ranking fellow employee, over a more than six months period, resulting in petitioner's suffering severe permanent mental and emotional injury, it was error depriving petitioner of a fair trial of her claim for the district court to repeatedly suggest in its jury charge that petitioner was abnormal or peculiar by reason of her having reacted to such prolonged harassment as she did.

2. Whether it was error for the court to instruct the jury that the measure of care owed to petitioner by the respondent, which had an explicit

policy forbidding sexual harassment, but which was shown to have taken no meaningful steps to prevent the continued harassment of petitioner, despite clear and repeated notice of how offended and threatened she felt by this conduct, was only such as would suffice to protect an idealized "normal" or "perfectly normal" person.

3. Whether it was error for the trial court to refuse to instruct the jury on causation in accordance with this Court's decision in Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957).

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NO. _____

IN THE
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October Term 1988

MARGARET HUDSON,

Petitioner,

-v-

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Margaret Hudson respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in this action on February 6, 1989.

OPINIONS BELOW

The summary memorandum of affirmance of the United States Court of Appeals for the Second Circuit, which will not be officially reported, appears in the Appendix to this petition. The unreported memorandum and order of the United States District Court of the Southern District of New York, dated July 5, 1988, denying petitioner's motion for a new trial appears in the Appendix to this petition.

JURISDICTION

By order dated March 13, 1989, the United States Court of Appeals for the Second Circuit denied petitioner's timely motion for rehearing. A copy of that order appears in the Appendix to this petition. This

petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

45 United States Code §51:

> Every common carrier by railroad while engaging in commerce...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury...resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier....

STATEMENT OF THE CASE

The Proof at Trial

At the trial of this action, petitioner adduced evidence of her having been repeatedly subjected, while she was employed in a low level cler-

ical position with the respondent (hereinafter "Amtrak"), to sexual harassment by a fellow employee, Edward Kortright, a low level supervisor whose office was located in the same part of New York's Penn Station to which petitioner had been newly assigned beginning on March 1, 1984. This harassment included an incident where Kortright came into her work area and engaged her in conversation while he sat on the edge of a credenza with his legs spread apart in an exaggerated fashion (T62-63).[1] This

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[1]Numbers in parentheses preceded by "T" refer to the transcript of trial, which is a complete transcript except for the testimony of petitioner's medical witness, which was only subsequently transcribed. References to the testimony of these witnesses are preceded by the witness's name. "JA" refers to the Joint Appendix in the Court of Appeals.

was shortly followed by an incident where he interrogated her concerning such personal matters as "How did your boyfriend treat you? Did he treat you good?" while at the same time touching her (T67-69), and by another incident where, after she had protested that she would take up with her boss Kortright's announcement that her "boyfriend," later her husband, who was also an Amtrak employee, could no longer visit her in her work area, Kortright, again touching her, stated, "Wait a minute. I don't want you to get in trouble. You're new here. You can lose your job. We're friends." (T70-70).

In mid-March, following these incidents, higher level Amtrak management and supervisory personnel were made aware of Kortright's harassment of

petitioner. At that time, supervisor Dee Thompson, to whom petitioner had earlier complained that she felt "trapped" by Kortright's harassment and was afraid of him (T73-76), was directed by her superior, Barry Sullivan, to emphatically instruct Kortright to cease and desist bothering petitioner (T363-64). However, Thompson, who had neglected to inform Sullivan of a similar sexual harassment complaint made against Kortright by another employee a month earlier (T397, 401-02, 302-04), did not do as Sullivan had instructed. Instead, notwithstanding Thompson had twice assured petitioner that she would "nip this in the bud" (T75, 77), all she did was to call Kortright into her office, inform him that petitioner had charged him with sexual harassment,

and, in virtually the same breath, tell him "not to worry" and to "continue to do your job" (T512). Sullivan did not follow up on this matter in any way (T364).

Following Thompson's conversation with Kortright, for over a month he ceased harassing petitioner. However, in late April or early May the harassment resumed, with Kortright's coming up from behind petitioner while she was at a copying machine, putting his arm around her and his chin on her shoulder, and asking her "What are you doing?" (T79; see also T323-24). A week later he again approached her in the copying room, but on this occasion he left when she looked up and saw him (T80-81). According to petitioner, she immediately complained of each of these

incidents to her supervisor, Frank Summa, who she claimed assured her that he would speak to either Thompson or Sullivan (T80, 82, 87).[2] These incidents were followed by a number of incidents where Kortright would come out of his office and stop short in front of petitioner and others where he would sit on a desk in the hallway, with his legs dangling, blocking her passage

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[2]Summa denied ever having discussed with petitioner her problems with Kortright, other than when she told him, after the fact, that she had filed a formal complaint against Kortright (T572-77). He did admit, though, to having discussed with Thompson in mid-March the "problem" of petitioner's then fiance coming into petitioner's work area (T572). Summa's claim of ignorance concerning petitioner's problem with Kortright was in significant respects contradicted by the testimony of his other secretary and by petitioner's union representative, both of whom testified that they discussed this matter with Summa (T505, 292-93).

(T83-84). In addition, in July there were two incidents, both on the same day, where he tried to bump into her (T83-86). Also, on August 13, as petitioner was passing him in the hallway, Kortright, who had been leaning against the wall, stepped into her, pushing his hip against her's (T90-91; see also T326-27).

Following the August 13th incident, petitioner attempted to file with Amtrak's Affirmative Action Office a formal written complaint charging Kortright with harassment. However, Stan Eastman, the employee assigned to receive such complaints, initially refused to give her the complaint form. Nonetheless, after petitioner complained to Eastman's supervisor, she was given the complaint form, which she

completed and returned on August 20 (T96-103; JA125-27). At that time, Eastman told her that he did not know how long it would take to act on her complaint (T107-08)--which was consistent with Mr. Sullivan's admission that Amtrak's personnel department generally took a long time to act on formal complaints of sexual harassment (T403).

Despite petitioner's various complaints, on August 21, the day after she filed her formal complaint, Kortright again harassed her by sitting on the hallway desk with his legs dangling and forcing her to brush against him as she attempted to get by--with Kortright stating loudly, "Well, excuse me," and then laughing (T108-09). This was followed a few days later by an incident where, after she had reported to the

maintenance department a flooding condition in her office, her husband, who was a supervisor in that department, informed her that, when he and a plumber had attempted to enter her work area, they were told by one of Kortright's subordinates that they could not enter this area without Kortright's permission--whereupon they simply left (T110-11).

Upon hearing of the latter incident, petitioner, who in March had complained to Thompson of feeling "trapped" by Kortright (T73-76), again had a feeling of being trapped and began to suffer severe stomach pains, similar to pains she had been experiencing in recent weeks along with episodes of vomiting (T109-12). Later that day, petitioner saw her doctor, who pre-

scribed medication for her, and thereafter she returned to work (T115-16, 119-21). However, still Kortright continued to harass her, glaring at her and occasionally trying to bump into her; he "would glare at [her] with leering, looking up and down" (T121-23).

On September 6 petitioner called Eastman to check on the status of her complaint, but was informed that he had done nothing because he did not know what to do. At this time she told Eastman of the flooding incident and that she was under a doctor's care (T122). On September 11, she again called Eastman, who on this occasion was annoyed with her and told her that "[t]hese things take time" and it was "none of [her]business" how they were progressing on her complaint. On this

occasion she told him that Kortright was continuing to harass her, but he still gave her no assurance that her complaint would promptly be acted upon; he could not even give her a time frame (T124-25). He did indicate, though, that he was forwarding her complaint to his supervisor in Washington (T126). However, when she spoke to that individual the next day, the supervisor knew nothing of her complaint and expressed anger at petitioner for having bothered her (T126-28).

The following week, petitioner went to see a psychologist, whom she continued to see through March, 1985. In the meantime, following her September 12, 1984 conversation with Eastman's Washington supervisor, petitioner did not return to work; instead,

she remained at home. In October, 1984, when she attempted to leave home, she experienced a panic attack, following which her psychologist referred her to a psychiatrist who prescribed medication for her panic reaction (T129-35). Following this, she never returned to Amtrak and she has since been unable to return to normal office work.

Petitioner's treating physician and psychiatrist both testified that she suffers from agoraphobia, a form of "panic disorder" (Howell 45; Orlosky 10), which the psychiatrist testified is a permanent condition (Orlosky 27-28). Both doctors testified that the precipitating cause of this condition was the sexual harassment plaintiff suffered at work (Howell 56; Orlosky 26-27). Neither doctor

testified that there was anything abnormal or peculiar about petitioner or that it was abnormal for sexual harassment to cause stress or anxiety which could endanger the victim's health. Moreover, petitioner's physician specifically rejected the notion that she had a predisposition to panic attacks, with the doctor noting that petitioner had endured other quite stressful situations which had not provoked panic attacks (Howell 55-57, 74-77). In this vein, the most that defense counsel was able to elicit from petitioner's medical witnesses (there were no defense medical witnesses) was testimony by petitioner's psychiatrist to the effect that patients suffering from panic attacks usually have some preexisting sign of anxiety vulnerability (Orlosky

52, 88-89, 101). In addition, petitioner's psychologist testified that her medical history, which included ulcer attacks and cancer surgery in her 20's, would "have a tendency to make somebody more vulnerable"--although he was firm that petitioner did not previously have "emotional problems" (Belt 28).

In addition to petitioner's testimony concerning the severe stomach pains and episodes of vomiting, including vomiting blood, she had been caused to suffer as a result of Kortright's harassment (T111-13), there was also testimony, through her physician, of other physical symptoms she had suffered as a result of this harassment. These included cold hands, shaking, dizziness and radiating pain (Howell

46, 51), as well as serious side effects from required medication (id. 60, 63-64, 67).

At the time of these incidents petitioner was in her early thirties (T33). She first worked for Amtrak from 1975 to 1980, when she left because her marriage, her second, was failing and her father was dying of cancer (T40-41, 43). She returned to Amtrak in August, 1983, shortly thereafter receiving a promotion (T45-51). There was no evidence that she was anything other than a stable, reliable employee, and Summa, for whom she worked for over six months, testified that he was completely satisfied with her work (T585).

It is Amtrak's declared policy that "[s]exual harassment is illegal and contrary to Company policy" (JA 120). It is Amtrak's policy

> to foster a work environment free of sexual discrimination, intimidation, and insult. Amtrak prohibits any employee...from making unwelcome and unsolicited sexual advances...or engaging in other verbal or physical conduct of a sexual nature, when (a) submission to such conduct is made explicitly or implicitly a term or condition of employment...or (c) such conduct creates an intimidating, hostile or offensive working environment.

(id.; see also JA 123). Such prohibited conduct is specified to include "offensive remarks or gestures of a sexual or suggestive nature" and "unwelcome physical contact" (JA 120 and 123). In addition, Amtrak also recognizes that "an 'intimidating, hostile or of-

fensive working environment' is defined by the aggrieved employee" (JA 124), and it declares that it is "the Supervisor's responsibility to safeguard the sensibilities of the most sensitive employee" (id.). It is the responsibility of the non-involved supervisor or Affirmative Action Office employee who receives a complaint of such harassment "to conduct a prompt and thorough investigation of all the circumstances surrounding the alleged incident" (JA 121), and supervisors are required to "take all steps possible to eliminate any harassment they become aware of" (id.), including "initiat[ing] disciplinary action whenever it appears a violation of this policy may have occurred" (id.).

The Charge Conferences and Charge

Despite the absence of any evidence to support this, and notwithstanding Amtrak's own policy-statements recognizing that sexual harassment can create an intimidating, hostile or offensive working environment (JA 120, 123), at the charge conferences, the court was insistent that no "normal" or "rational" person would have reacted to Kortright's harassment as had petitioner (JA 23, 26, 30). In addition, again with no basis in the record, it insisted that petitioner had had an "unhappy life experience...which made her extraordinarily susceptible to damage from any sexual contact whatever" (JA 49). Thereafter, in its charge, which was largely extemporaneous, with the court radically departing from what

it had earlier indicated it would be instructing the jury (see, e.g., JA 103: court not even able to recall whether it had defined negligence), the court became in effect a defense witness, repeatedly suggesting that there was evidence indicating that in fact plaintiff was "abnormal," with a "very inordinate susceptibility to this kind of thing" (JA 90-91; see also JA 95-96), and, immediately following this misstatement of the evidence, the court instructed the jury that Amtrak's duty of care toward petitioner was only such as would suffice to protect the "ordinary" or "normal" or "perfectly normal" person (JA 91).

In thus charging the jury the court abandoned its earlier representation, at the final charge conference,

that it would not be telling the jury that petitioner was "peculiar" and that negligence is to be judged by what is sufficient to protect the "generality" of persons (JA 60). Also, it omitted its earlier proposed instruction that Amtrak was required to use reasonable care "to minimize the instances of [sexual] harassment to the extent possible [and to] contain[] the damage, if such should occur" (JA 50). Compare petitioner's request to charge No. 7: "Negligence is the failure to exercise that degree of care which a reasonably careful and prudent person would have exercised under the same circumstances...." (JA 11); see also JA 29, 32-33, 42, 55-56: counsel urging that issue was whether Amtrak had acted reasonably based on what was known to it.

In addition to these errors, declaring that it had "never seen" an appellate opinion applicable to a case it was trying, the court refused to charge on causation in accordance with Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957) (JA 36-37). Instead, it instructed the jury that, in order to find for the petitioner, it would have to find that

> defendant's failure to use reasonable care was a cause of the sexual events, and that the extent of [petitioner's] injuries resulted directly from these events

(JA 96). Compare 352 U.S. at 506 (issue whether "employer negligence played any part, even the slightest, in producing the injury").

The Jury's Note and Verdict

In the course of its deliberations, the jury sent out a note stating, in part:

> We feel that sexual harassment took place. We do not feel Amtrak was negligent in its response to charges. We, therefore, feel no compensation should be paid....Please advise.

(JA 116). In response to this note, the court told the jury that this meant that the jurors should render a verdict for the defendant (JA 119). On this basis the jury was polled, rendering a verdict in Amtrak's favor (T792-93).

The Memorandum of Affirmance

In its summary order of affirmance, the Court of Appeals held that the district court's charge was a "fair statement of FELA law as it should apply to the circumstances of this

case" (3a). It further stated, "The court's references to plaintiff's possible over-susceptibility to injury from conduct of the type complained of were appropriate in light of the evidence and the arguments of counsel" (id.). This was presumably intended as a complete answer to petitioner's arguments that the district court's charge misstated the evidence and, related to this, incorrectly instructed the jury on Amtrak's duty of care toward petitioner. The Court of Appeals made no reference to petitioner's complaint with respect to the instruction on causation.

With respect to the Court of Appeals' reference to the evidence as purportedly justifying the trial court's statements concerning "possible

over-susceptibility to injury from this type of conduct" (3a), we would reiterate that there was no such evidence. Moreover, there was no evidence that only a person who was abnormal could suffer stress leading to injury by reason of the prolonged harassment here complained of. Nor was there any evidence, apart from Amtrak's own policy statements (JA 120, 123), as to how the typical range of victims might be affected by such conduct, although it was plain on this record that petitioner, who was not shown to be abnormal, felt both offended and threatened by Kortright's continuing conduct and that Amtrak was on clear notice of this fact.

As to the "arguments of counsel" supposedly justifying this charge,

we would note that the idea that petitioner was somehow abnormal or peculiar, with extreme susceptibility to injury by reason of sexual harassment, was entirely the invention of the district court, which consistently overruled the objections of petitioner's counsel that there was no such evidence (see, e.g., JA 25-29, 55-56), just as it rejected counsel's repeated urgings that the issue of negligence here turned on whether Amtrak had acted reasonably based on what was then known to it (e.g. JA 29, 32-33, 42, 55-56). Based upon these factually unsupported and legally incorrect rulings, petitioner's counsel did thereafter in his summation attempt to counter this argument which he was aware would be before the jury (see T 639-44; see also JA 56

[defense counsel embracing court's suggestion of abnormality] and T721 [defense summation]). But under no fair view can these errors in the court's charge be attributed to petitioner's counsel.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY TO PROVIDE CRITICALLY NEEDED GUIDANCE CONCERNING HOW JURIES SHOULD BE INSTRUCTED ON THE ISSUE OF NEGLIGENCE IN BUELL-TYPE ACTIONS, INCLUDING ACTIONS BASED ON SEXUAL HARASSMENT.

In Atchison, Topeka & Santa Fe R. Co. v. Buell, 480 U.S. 557 (1987), this Court, while leaving open the question of whether the FELA would support a claim based exclusively on "wholly mental" or "purely emotional" injury, 480 U.S. 567 and 570 n. 22, clearly suggested that this "broad reme-

dial statute" (id. at 562) might well be held to support such a claim, although this "might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity" (id. at 568). Buell also plainly suggested that a "mental injury" claim under FELA would lie where, as here, there was both such traditional tortious conduct as assault and battery and severe physical symptoms, see 480 U.S. 577 n. 22, a view which, at least as a practical matter, was markedly reinforced when, one week later, this Court denied certiorari in Norfolk & Western R. Co. v. Lancaster, 480 U.S. 945 (1987), where, in a comprehensive and carefully reasoned opinion for the Seventh Circuit, Judge Posner had

pointed out why allowing recovery under such circumstances would represent no unwarranted extension of the FELA. See Lancaster v. Norfolk & Western R. co., 773 F.2d 807 (1985).

To be sure, the exact parameters of what will be held actionable under Buell remain to be finally determined. Compare, for example, Hammond v. Terminal R. R. Ass'n of St. Louis, 848 F.2d 95 (7th Cir. 1988), cert. denied, 57 U.S.L.W. 3552 (February 21, 1989), and Adkins v. Seaboard System R. R., 832 F.2d 340 (6th Cir.), cert. denied, 108 S. Ct. 452 (1987), holding against liability, with Pierce v. Southern Pac. Transp. Co., 823 F.2d 1366, 1372 n. 2 (9th Cir. 1987), and Halko v. New Jersey Transit Rail Operations, Inc., 677 F. Supp. 135 (S.D.N.Y. 1987),

both allowing recovery where emotional distress led to victim's death. But it can be anticipated that our courts will be increasingly faced with such claims, including claims based on sexual harassment. See Amendola v. Kansas City Southern Ry. Co., 699 F.Supp. 1401, 1407-11 (W.D. Mo. 1988) (collecting cases). See also Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (discussing sexual harassment in context of Title VII claim); R. Sandroff, "Sexual Harassment in the Fortune 500," Working Woman, December 1988, p. 69 (reporting results of 1988 survey of Fortune 500 manufacturing and service companies); "Statement [of American Psychiatric Association] on Discrimination Based on Gender or Sexual Orientation," Am. J. of Psychiatry, November 1988, p. 1494

(identifying sexual harassment as a "potentially severe occupational stressor[]").[3] And, presumably, it was this Court's intention in Buell that all such plaintiffs were to have their claims "fairly weighed." Compare Steinhauser v. Hertz Corp., 421 F.2d 1169, 1172 (2d Cir. 1970) (Friendly, J.) (infant plaintiff who had been neither "perfectly normal" nor schizophrenic prior to accident entitled to have her theory of defendant's liability fairly weighed by jury); see also Bentley v.

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[3] Compare Matter of Crookston v. Brown, 140 A.D.2d 868, 869-70, 528 N.Y.S.2d 908, 909-10 (3rd Dept. 1988) (describing sexual harassment as among the most demeaning and offensive torments an employee can undergo and noting that many victims will suffer devastating psychological and physical symptoms).

Stomberg-Carlson Corp., 638 F.2d 9, 11 (2d Cir. 1981) (citing this Court's decision in Quercia v. United States, 289 U.S. 466 (1933), for proposition that it was error depriving age discrimination plaintiff of a fair trial, and indeed tantamount to directing a verdict for the defendant, where the trial court in its charge unfairly summarized the evidence); McGlothan v. Pennsylvania R. Co., 170 F.2 121, 125 (3rd Cir. 1948) (unfair charge in FELA case).

In this regard we would note that not only was petitioner grievously prejudiced by the trial court's repeated remarks indicating that she was abnormal or peculiar, but also, compounding this unfairness, she was equally grievously prejudiced by the

court's measure of duty instruction. As petitioner's counsel tried, unsuccessfully, to point out to the court, the concept of negligence is not based on what will suffice to protect some idealized "perfectly normal" person. Rather, it is based on ordinary care under the circumstances. See, e.g., 3 Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions, Civil (4th ed. 1987), §§94.02, 94.04, 94.05, 94.10; 3 Harper, James & Gray, The Law of Torts (2d ed. 1986), §§16.12 and 16.19; Prosser & Keeton, The Law of Torts (5th ed. 1984), §31-33; cf. Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), reversed 312 U.S. 492 (1941) (L. Hand, J.) (likelihood that conduct will injure others, taken together with seriousness of injury if it

happens, balanced against interest which must be sacrificed to avoid risk); Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928) (Cardozo, J.) (negligence relative to need and occasion); see also Eaton v. Long Island R. co., 398 F.2d 738, 742 (2d Cir. 1968) (ease with which defendant could have taken effective measures to eliminate or reduce risk posed). It includes the obligation to regulate one's conduct with a view to a range of other people's disabilities and frailties. 3 Harper, James & Gray, The Law of Torts (2d ed. 1986), §16.12, p. 494; id. §18.4, pp. 691-92; cf. Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913). And here, it is submitted, it required consideration of the fact that petitioner had complained

repeatedly of Kortright's conduct and was obviously most offended and disturbed and frightened by that conduct. It also required consideration of the fact that workplace sexual harassment is both unlawful and recognized as a source of occupational stress and anxiety. See, e.g., Prosser & Keeton, The Law of Torts (5th ed. 1984), §36; see also id., §43.

Of course, what we are talking of here is really nothing more than basic negligence doctrine and what is the duty of a trial court in instructing a jury. But, as the cases and commentaries all indicate, these negligence concepts are subtle and their interaction and application to particular factual situations can be most complex, including consideration of who

should bear the risk of loss, the innocent plaintiff or the defendant, and what social policies will be advanced by, for example, holding an actor to strict adherence to statutory requirements of conduct. See, e.g., Prosser & Keeton, the Law of Torts (5th ed. 1984), §36. Compare, Buell, 480 U.S. at 568 (FELA liability can turn on "subtle and intricate distinctions").

Moreover, as Buell pointed out, here we are in a still rapidly evolving area of tort law. See 480 U.S. at 568-70. And, as this case unfortunately so amply demonstrates, there will be trial judges who are insensitive to, or even biased against, the claims of plaintiffs in such actions, who will not perceive how any but the "abnormal" or "peculiar" could

be injured by such conduct, and whose attitudes toward such claims will undoubtedly affect how in such cases they instruct juries.

This case presents this Court with the opportunity to demonstrate that Buell was not intended as an empty promise, that this Court meant what it there said concerning the FELA being a "broad remedial statute." 480 U.S. at 562. This case presents the opportunity for this Court to make it clear to the lower courts that plaintiffs such as this petitioner are entitled to have their claims seriously and properly considered and fairly tried.

In addition, this case presents the opportunity for this Court to emphasize how careful trial courts must be in distinguishing for the jury be-

tween the care that is due to protect the range of persons who reasonably might be harmed--to any appreciable degree--by an actor's action or inaction and the fact that a particular victim may in fact have suffered unusually severe consequences as a result of the actor's negligence. Even such "eggshell" plaintiffs are entitled to be protected from the actor's negligence. See Prosser & Keeton, The Law of Torts (5th ed. 1984), §43; Steinhauser v. Hertz Corp., 421 F.2d 1169. And, in the case of Buell-type plaintiffs, it is especially important that this distinction be made clear. Like the plaintiffs in Buell and Lancaster, this petitioner suffered a most severe reaction to harassment which others, not all, but certainly

many others, might well be able to survive without any great harm. But that does not suffice to render Amtrak's conduct in this case not negligent.

If plaintiffs in such cases are to have their claims treated as was petitioner's, then Buell will be rendered a truly hollow promise. This case affords this Court the opportunity to point out that the employer's duty of care in such cases is not merely to protect some idealized "perfectly normal person," nor, where there is actual notice of such harassment, even some undefined "generality" of persons. Rather, as petitioner's counsel repeatedly, but unsuccessfully, urged the trial court, the employer's duty of care is also a function of what has

been made known to it concerning such harassment. It should not be enough to enable the employer to avoid liability that the victim's reaction to such harassment was in fact more severe than might ordinarily be expected. It is enough to find liability that the employer was on notice of the potential for some harm but nonetheless failed to act reasonably to provide the employee with a safe place to work.

Finally, this case presents this Court with the opportunity to point out that with specific reference to workplace sexual harassment, which is both illegal and recognized as a hazard to the health of its victims, it is not enough for the employer to have a formal policy prohibiting such conduct, but which it is unwilling to

enforce. Title VII's prohibition of such conduct and what Congress, the courts and modern psychiatry have all said as to how wrong and harmful this is should suffice to require, as does Amtrak's own stated policy, that complaints of such conduct be promptly and thoroughly investigated and, where there is substance to the complaint, that immediate action be taken to protect the victim. There is nothing "subtle" about such conduct (Buell, 480 U.S. at 568), nor does its being held actionable require application of "intricate distinctions" (id.). It is illegal; it serves no valid work purpose; and it is plainly a hazard to the health of its victims. When it is brought to the attention of the employer, the employer must be required

to take strong, positive, immediate, and appropriate steps to prevent its recurrence.

2. THIS CASE ALSO PRESENTS THE OPPORTUNITY FOR THIS COURT TO REAFFIRM THE NEED FOR PROPER INSTRUCTIONS ON CAUSATION IN FELA CASES.

Although it is generally accepted that in FELA cases the court must follow the Rogers decision in instructing the jury on causation, see, e.g., Sand, Siffert, Reiss, Sexton & Thrope, Modern Federal Jury Instructions, par. 89.02[4], as this case illustrates, how the concept of causation figures in a negligence case, especially in a case where there are multiple actors whose negligence could have contributed to the plaintiff's injury, is not always clear. See generally 4 Harper, James & Gray, The Law of Torts

(2d ed. 1986), §§20.2 and 20.3; Prosser & Keeton, The Law of Torts (5th ed. 1984), §41, pp. 270-72. Cf. Price Waterhouse v. Hopkins, U.S. , , 57 U.S.L.W. 4469, 4479 (May 1, 1989) (O'Connor, J., concurring). And, it is submitted, if this case is properly analyzed in terms of the various Amtrak employees whose negligence might have contributed to petitioner's injury, it is apparent that petitioner was grievously prejudiced by the district court's refusal to charge in accordance with Rogers.

In this case the issue of causation did not relate simply to whether petitioner's injury resulted from Kortright's harassment. Here, the issue of causation included also whether the negligence of any number of

Amtrak employees, for example, Summa, Thompson, Sullivan or Eastman, contributed in any way, however slight, see Rogers, 352 U.S. at 506, to petitioner's injury. It included, for example, whether Summa negligently failed to report to his superiors, as Amtrak policy clearly required him to, petitioner's complaints of Kortright's continuing harassment. It likewise included whether Sullivan, Thompson and Eastman each did what reasonably they should have done based on what they were on notice of. See 45 U.S.C. §51 (issue whether plaintiff's injury "result[ed] in whole or in part from the negligence of any of the officers, agents, or employees of such carrier"). Compare Meritor Savings Bank v. Vinson, 477 U.S. at 75 (Marshall, J., concur-

ring) (employer can only act through individual supervisors and employees; discriminatory acts may take place in defiance of company policy). On this issue a proper Rogers instruction undoubtedly would have been of immeasurable help to this jury. But, because the trial court, which had "never seen" an appellate opinion applicable to a case it was trying (JA 37), refused to charge in accordance with Rogers, this jury was never required to focus clearly and carefully on this so fundamental issue, which, even apart from the trial court's unfair comments on the evidence and its incorrect instruction on duty, could well explain this jury's otherwise inexplicable finding that Amtrak was not negligent toward plaintiff.

Moreover, quite apart from the fact that a proper Rogers instruction would have assisted this jury in assessing the individual negligence or non-negligence of each of these various actors, it is submitted that this error in the charge is not mooted by reason of the jury's indication in its note that it did not feel Amtrak was negligent in its response to plaintiff's complaints. In negligence law the concept of causation is both subtle and complex. And in the case of FELA actions, causation takes on an even more important meaning. To be sure, causation may be analyzed as distinct from negligence, but plainly in the ordinary FELA case a proper Rogers instruction can have broad effect on a jury's view of the case and in its evaluation of

whether the defendant should be held liable to the injured plaintiff. Compare Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963); Webb v. Illinois Central R. Co., 352 U.S. 512 (1957). In addition, before it may properly be held that a failure in such a case to charge in accordance with Rogers was harmless, based on a jury's "finding" of no negligence, it is necessary to consider whether in fact the negligence finding was itself proper, including whether it was based on a correct negligence instruction. Further, it is also necessary to consider with what sort of precision and care the jury made its purported finding of no negligence.

In this regard we would note that in this case defense counsel had

himself during the charge conferences acknowledged how related were the concepts of negligence and causation when he indicated that he expected that the negligence instruction would be "integrated" with the court's instruction on causation (JA 51), which in fact it was (JA 95-96). And, as a matter of common sense, it is obvious that this lay jury, which was not a panel of legal scholars, and which had not been asked to separately address on the verdict sheet the issues of negligence and causation, may well not have distinguished between these concepts, especially in the context of this overall so inadequate and misleading charge, and certainly the jury's note does not evidence such careful distinction. Also, had the court charged in accordance

with Rogers, this might well have served to impress upon the jury something of the nature and purpose of the FELA, which, as Rogers and its progeny so plainly indicate, was not intended to be applied in so crabbed a fashion as the district court's overall charge in this case suggested. Cf. Buell, 480 U.S. at 562.

Plainly, it was error here for the court not to have charged in accordance with Rogers, and there is no fair basis for holding that this error was harmless. This case presents this Court with the opportunity to reaffirm the need for a proper causation instruction in cases such as this.

CONCLUSION

Stripped to its essence, this is a case about discrimination and harassment, comparable in many respects to racial or ethnic discrimination. See Meritor Savings Bank v. Vinson, 477 U.S. at 65-67. Further, it is about conduct which is not merely cruel, but also can be hazardous to the health and wellbeing of its victims. It is about a young woman who was entitled by law, as well as Amtrak's own express policy, to a workplace free of such conduct. And it is about her right to a fair trial on her claim that her disabling condition was caused by Amtrak's negligence in allowing Kortright to so cruelly harass her. Were this a case involving racial or ethnic discrimination, or were it one where petitioner

was physically attacked by Kortright, we feel certain this Court would not allow to stand a defendant's verdict rendered on a record comparable to this. It would undoubtedly, we believe, hold that a new trial was required by reason of the trial court's misunderstanding of the law and the evidence and the errors in the charge reflecting that misunderstanding.

No less is due here. This case presents this Court with the opportunity to send out a clear message to the lower courts that it meant what it said in Buell. It likewise presents the opportunity for this Court to make clear to the courts, as well as to employers and the victims of sexual harassment, that it takes most seriously this so cruel and hazardous form of

discrimination. Based upon the errors which occurred at this trial, this Court should grant the writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel of Record

Counsel for Petitioner

May 31, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of February, one thousand nine hundred and eighty-nine.

P R E S E N T :

HON. GEORGE C. PRATT,

HON. FRANK X. ALTIMARI,

Circuit Judges,

HON. LEONARD B. SAND,

District Judge,
Southern District
of New York,
sitting by
designation.

UNITED STATES
COURT OF
APPEALS
SECOND CIRCUIT

Filed
Feb. 6, 1989

Elaine B.
Goldsmith,
Clerk

----------X

MARGARET HUDSON,

Plaintiff-Appellant,

-against-

Docket No.
88-7733

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellee.

----------X

This appeal from a final judgment of the United States District Court for the Southern District of New York, Knapp, Judge, dismissing plaintiff's complaint under the Federal Employers' Liability Act (FELA) (45 U.S.C. §51 et seq.), came on to be heard on the transcript of the record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered that the judgment appealed from be and hereby is affirmed.

Margaret Hudson appeals from this judgment entered after a jury verdict in favor of the defendant, claiming that the trial court's charge to the jury, insofar as it concerned negligence and causation and identified those Amtrak employees who had a duty

to Hudson as "managerial employees", was improper and misleading. The charge given by the district court was a fair statement of FELA law as it should apply to the circumstances of this case. The court's references to plaintiff's possible over-susceptibility to injury from conduct of the type complained of were appropriate in light of the evidence and arguments of counsel. Plaintiff received a fair trial.

/s/
George C. Pratt, U.S.C.J.

/s/
Frank X. Altimari, U.S.C.J.

/s/
Leonard B. Sand, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of March, one thousand nine hundred and eighty-nine

PRESENT:

Hon. George C. Pratt, C.J.

Hon. Frank X. Altimari, C.J.

Hon. Leonard B. Sand, D.J.

CIRCUIT JUDGES,

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed
March 13, 1989

Elaine B. Goldsmith, Clerk

---X

MARGARET H. HUDSON,

Plaintiff-Appellant,

-against-

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellee.

Docket No. 88-7733

---X

A petition for rehearing having been filed herein by Plaintiff-Appellant MARGARET H. HUDSON.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

By: FRED M. CASSIDY
Chief Deputy Clerk.

MEMORANDUM DECISION AND ORDER
OF HON, WHITMAN KNAPP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

MARGARET H. HUDSON,

Plaintiff-Appellant,

-against-

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellee.

Memorandum and Order

86 Civ. 5794 (WK)

----------X

WHITMAN KNAPP, D.J.

Plaintiff moves pursuant to Fed. R. Civ. P. 59 for a new trial. The motion is based solely on the claim that the court committed error in its charge concerning negligence. Because no exception was ever taken to the challenged portion of the charge, the motion is denied.

At the close of its charge, the court invited counsel into the robing room, where a discussion of considerable length occurred (T. 28-33).[1] This was followed by some additional instructions to the jury (T. 33-35), a side bar requested by defense counsel (T. 35-37), further instructions (T. 37-41), "one last side bar" requested by plaintiff's counsel (T. 41), and one more instruction to the jury (T. 41-42). Not once during all of these discussions did plaintiff's counsel so much as suggest the error about which he now complains.

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[1] "T." refers to the transcript of the court's charge, and "1." refers to a line of that transcript.

During the robing room conference, plaintiff's counsel requested charges on work and life expectancy (the latter was granted), and then stated, "That's the only request I have" (T. 29 l. 14). Defendant's comments on the charge prompted a general discussion on the question of negligence, in which plaintiff's counsel participated (T 29 l.24 - 31 l. 17). However, plaintiff's counsel made no objection to anything the court had said; he took exception only to the court's intention to clarify--and to some extent repeat--its instructions concerning the responsibility of managerial personnel (T 31 l. 1-15). Plaintiff's counsel then proposed that the term "supervisor" be used, rather than

"managerial personnel," a suggestion which the court adopted (T. 32 l. 19-22).

The topic of the first sidebar was comparative and contributory negligence. Plaintiff's counsel participated in the discussion and noted his exception to the court's resolution of the question (T. 37 l.2). The "one last side bar" requested by plaintiff's counsel was devoted to the question of the burden of proof on contributory negligence, and the court agreed with his position, leading to one final instruction (T. 41 l.21 - 42 l.14).

Moreover, even if the plaintiff's suggested charge had been requested at the appropriate time, the court would have been obligated to deny

it. Plaintiff's basic contention is that the jury was not alerted to the possibility that Amtrak might have been aware of plaintiff's "eggshell" condition. However, there is not a scintilla of evidence to suggest that Amtrak had any such awareness.

For the foregoing reasons, plaintiff's motion for a new trial was denied. We accordingly direct the Clerk to enter an appropriate judgment dismissing the complaint, with costs to be taxed.

SO ORDERED.

DATED: July 5, 1988
New York, New York

/s/
WHITMAN KNAPP, U.S.D.J.